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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 544

ABRAM P. STECKEL, *Petitioner*,

v.

REUBEN L. LURIE AND ABRAHAM T. ALPER, Co-Partners Doing Business Under the Firm Name and Style of LURIE & ALPER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FREDERICK BERNAYS WIENER,
1009-1015 Tower Building,
Washington 5, D. C.,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

ABRAM P. STECKEL, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on November 17, 1950.

OPINIONS BELOW.

The opinion of the district court on the right of the retired district judge to act in the absence of a designation (R. 333-334) is reported at 87 F. Supp. 702. The opinion of the district court on the merits (R. 321-324), less a para-

graph later omitted (R. 327), is reported at 79 F. Supp. 723. The opinion of the court of appeals (R. 389-407) has not yet been reported.

JURISDICTION.

The judgment of the court of appeals was entered on November 17, 1950 (R. 389). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether, in a jury-waived action by lawyers against their client for their fee, where the district court's opinion enumerates eight factors taken into account in fixing the reasonable value of the lawyers' services but where the findings set out only one of those eight, where neither the findings nor the opinion disclose just what the lawyers did or just what results they attained in litigation, and where the "fair and reasonable value" of the services rendered is determined as a conclusion of law, the findings of fact are adequate to show the factual basis for the district court's conclusion as required by Rule 52(a), F. R. Civ. P.

2. Whether, in a jury-waived action by lawyers against their client for their fee, where the client defends on the grounds, *inter alia,* of professional misconduct, including the lawyers' alleged failure to accept dismissal, their failure to surrender the transcript of record, their failure to state the amount of their charges, their assertion of a financial interest in the litigation, and their admitted failure ever to present a bill, and where the district court specifically stated that "in view of * * * professional considerations it would be wrong to allow the plaintiffs the amount they ask" but made no findings as to what those considerations were, there has been a compliance with Rule 52(a), F. R. Civ. P.

3. Whether, where a district judge has indicated in writing to counsel that he will grant a new trial if certain funds impounded in other lawsuits brought by the Government do not go to a particular company, he may *ex parte* refer to the orders in such other lawsuits, which were never introduced in evidence in the case in chief, without giving one of the parties an opportunity to show that the particular company's recovery was very substantially diminished by a subsequent Government tax assessment.

4. Whether, after a motion for a new trial has been filed, and a district judge makes and initials a memorandum which is duly sent to counsel for the parties, which indicates the action he plans to take on that motion, and which explains and justifies his delay in not disposing of it for fifteen months thereafter, the court of appeals may properly strike that memorandum from the record on appeal.

5. Whether orders in other lawsuits, which were neither introduced in evidence nor referred to in the proceedings in the case in chief, are properly a part of the record on appeal in such case in chief.[1]

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[1] In the event that a writ of certiorari should be granted in this case, petitioner intends to raise the following additional questions going to the merits:

6. Whether the refusal by lawyers of a client's proffer of part payment of a fee, offered without prejudice to the assertion of a further claim, and rejected in circumstances prejudicial to the client's interests, can be justified on the ground that the part payment was not in cash, where the lawyers never objected to the medium of the tender.

7. Whether, in an action by lawyers against their client for a fee, where the lawyers refused to accept their dismissal by the client, refused to surrender the transcript, refused to state the amount of their claim to the time of attempted dismissal or to accept security for the transcript, asserted a financial interest in the litigation (in which the client was a defendant) and insisted on continuing the representation in order to protect such interest, thereafter refused the client's proffer of an unconditional partial payment in circumstances prejudicial to the client, and never rendered a bill to the client before bringing suit, a court should approve such conduct as consistent with accepted professional standards so as to justify the allowance of a substantial recovery to the lawyers as compensation for services subsequent to such conduct.

RULES OF CIVIL PROCEDURE INVOLVED.

The Federal Rules of Civil Procedure involved in this case are set out in the Appendix, *infra,* pp. 27-29.

STATEMENT.

This petition seeks to review the affirmance of a money judgment entered in an action brought by two attorneys, respondents here, to recover the alleged value of their professional services from their client, the present petitioner.

The basic facts were stipulated at some length (R. 7-81); the statement which follows is a drastically condensed epitome of the record, designed simply to show the background out of which the questions now presented arise.

A. The Circumstances of Respondents' Employment.

The petitioner Steckel, inventor of a revolutionary method of rolling steel plates, was a director and minority stockholder in The Cold Metal Process Company, hereinafter referred to as Cold Metal, to which he had assigned his patents. Prior to the end of 1934, a bitter dispute had arisen between petitioner and his fellow directors, whom he accused of despoiling the company, and of conspiring to eliminate him from its direction and to wipe out completely his stock interests therein. The details as to petitioner's situation in early 1935 are stipulated at R. 8-10, 26-33.

At that time, petitioner retained the respondents Lurie and Alper "to represent him and to protect his interests in certain pending litigation in which Steckel was involved as a party and in all matters relating to Steckel's interest in The Cold Metal Process Company and his activities to protect said interest and to protect the assets of The Cold Metal Process Company" (R. 10).

Petitioner advised respondents that under existing conditions he would be unable to compensate them for their services on a definite and assured basis, "but that their compensation would have to be contingent upon the rea-

sonable value, if any, of the services rendered for Steckel and upon his ability to pay as represented by and based on the extent to which he could retain his stock against the attacks being made on him and the value which the stock developed" (R. 11-12).

It was stipulated (R. 9) that "The value of Steckel's stock interest in The Cold Metal Process Company was largely dependent upon the good faith, energy and skill with which litigation and negotiations, outside of court, with respect to protecting [its assigned] patent rights, would be carried on in behalf of the company," and further stipulated (R. 22) that neither respondents, nor Lee M. Friedman of the Massachusetts bar, whose services they provided (R. 18), had anything to do with any of the patent litigation, or with negotiations for settlement of patent litigation, in which Cold Metal was involved.

It was further stipulated (R. 21-22) that the value of Cold Metal stock would depend in part on the ultimate disposition of certain royalty payments which had been impounded in court to await the outcome of *United States* v. *Cold Metal Process Co.*, 164 F. 2d 754 (C. C. A. 6), certiorari denied, 334 U. S. 811, 835, and that (R. 22)—"The availability of this money to Steckel, so far as his share is concerned, depends upon whether or not further litigation in connection with it is pursued by the government."

B. Respondents' Services and Results Attained Thereby.

Respondents and Friedman rendered services to petitioner as follows:[2]

(i) *The Federal Case.* This was a stockholder's suit, *Thomson* v. *Cold Metal Process Co.*, in the U. S. District Court for Northern Ohio, which sought an accounting and

[2] It is not disputed that repondents and their associate devoted a total of 1539¼ days in rendering professional services for petitioner from January 31, 1935, to December 14, 1940 (R. 20; Fdgs. 2-3, R. 328).

a receiver; the details were stipulated (R. 13-15, 34-57).

Respondents and Friedman represented petitioner in the preliminary proceedings, the hearing before the master, the exceptions to the master's report, and the motion for rehearing thereon (R. 36-47). The argument on rehearing was made by another lawyer, because of petitioner's dissatisfaction with Friedman (R. 48; Ex. 16, R. 260; Ex. 18, R. 262; Ex. D(1), R. 317). Respondents did not attend the accounting hearings before the master. By the time final judgment was entered for Cold Metal, for $57,073.39 net (R. 49), Messrs. Bulkley & Butler of Cleveland had become principal counsel for petitioner (R. 15, 53-57, 114-115, 212-213). No receiver was ever appointed (R. 48, 53-54), although petitioner vigorously urged such relief (R. 48, 105, 200; Ex. 16, R. 260; Ex. 18, R. 262). In 1940, the respondent Alper rendered some assistance in the matter of ousting counsel representing Cold Metal, in consequence of which $30,000 in fees were repaid to the company (R. 56-57). Two Youngstown lawyers also represented petitioner in this case in addition to respondents and Bulkley & Butler (R. 35, 51, 244, 262, 265, 291, 292, 310).

(ii) *The Option Case.* This was a proceeding, *Standard Slag Co.* v. *Steckel,* in the Court of Common Pleas of Mahoning County, Ohio, to force petitioner to deliver 160 shares of Cold Metal stock for $56,000 in reliance on a purported option; the details are set out at R. 15-16, 57-62. Respondents and Friedman tried the case and lost it (R. 59-60), then took it to the Court of Appeals of Mahoning County and lost the appeal (R. 60-61). While a motion to certify the case to the Supreme Court of Ohio was pending, petitioner yielded because he was pressed for funds, and accepted the $56,000 for the 160 shares (R. 12, 15-16, 61, 107, 233-234; cf. Ex. C, R. 312-315). By reason of other judgments and attachments petitioner received only about $21,000 of the $56,000 (R. 109-110, 234).

(iii) *The Advances Case.* This was *Cold Metal Process Co.* v. *Steckel,* also in the Court of Common Pleas of Ma-

honing County, an action to recover from petitioner some $25,014.15 alleged to have been illegally advanced to him; the details are at R. 16-17, 63-68. Prior to respondents' employment, a verdict for $18,316.15 had been directed against petitioner after a trial. Respondents appealed, without success (R. 65-66), and were also unsuccessful in their Motion to Certify in the Supreme Court (R. 66).

It was stipulated (R. 16-17) that "It was desirable in the protection of Steckel's interest that, if possible, this judgment be reversed and in any event, that no levy of execution should be made to enforce it against Steckel's stock interest in The Cold Metal Process Company." Respondents did not succeed in reversing the judgment, and petitioner was obliged to surrender his 160 shares in the Option Case to obtain funds to meet pressing obligations (R. 109-110, 234), including this judgment. Of the four years' delay which ensued between the trial and the denial of the Motion to Certify (R. 65, 66), over two years were attributable to the congested calendar of the Court of Appeals (R. 65, items (j), (k), and (l)).

(iv) *Other Services.* The details of respondents' other services, in connection with the internal management of Cold Metal, with efforts to obtain financing, and with efforts to settle petitioner's controversies, were also stipulated (R. 17-18, 68-81). Respondents' efforts at settlement were unsuccessful (R. 75-81), and they obtained no financing satisfactory to petitioner (R. 72-75, 96-97, 232, 235-236), though they did require petitioner to pay a friend of theirs $5000 (R. 232). Respondents' services in connection with Cold Metal's internal affairs (R. 68-72) involved the study of documents, which was necessary in any event in connection with the trial of the Federal Case, as well as attendance at director's meetings, which would not have been necessary if they had succeeded in having a receiver appointed as petitioner urged (*supra*, p. 6).

C. The Circumstances of Respondent's Professional Conduct.

(i) *Petitioner's attempts to dismiss respondents from further representation.* Petitioner's increasing dissatisfaction with respondents' handling of his affairs (Ex. B, R. 306-311; Ex. 50, R. 293-296; R. 210-211, 229-230) came to a head in the summer of 1937, when, after the master had reported in the Federal Case, petitioner asked respondents not to ask for any extension of time for the filing of exceptions (Exs. 3-4, R. 245-251; R. 99-100). When respondents then asked for more time (Ex. 2, R. 244; Ex. 6, R. 252-253; cf. Ex. 12, R. 257), petitioner undertook to dismiss them, wiring (Ex. 5, R. 252; Ex. 8, R. 254), "* * * after deliberation I am putting the whole matter of preparation of exceptions and brief into hands of Rigelhaupt * * * I ask you express entire record of case to me tomorrow collect * * *"

Respondents refused to be dismissed; Lurie wrote (Ex. 9, R. 255):

> It is not necessary for me to remind you again, though I have done it now in two letters, of the great obligations you owe to us. If you are prepared to discharge this obligation, then, of course, you may handle affairs as you see fit; but in view of the obvious fact that you cannot discharge this obligation under the present circumstances, and in order to protect our own rights, we shall continue with the preparation of the Exceptions and the Brief. * * *

Lurie testified that, in using the expression "our own rights," he meant financial rights (R. 139).

Petitioner telegraphed again (Ex. 7; R. 253)—

> * * * Must have telegram before noon Wednesday stating when and how record shipped because dismissal from case on first notification deliberate and unconditional.

Respondents refused to ship the record or to accept dismissal, and insisted on preparing the exceptions and the brief (Ex. 10, R. 256). Meanwhile petitioner, on receipt of the letter in which Lurie insisted on continuing "in order to protect our own rights" (*supra*), called on respondents (Ex. 11, R. 256) to "wire present total obligations in dollars including Friedman and also number of shares of stock to be posted as security thus releasing record." But respondents adhered to their refusal and refused either to state the amount of their claim or the security they desired; Lurie replied (Ex. 12, R. 257):

> * * * It obviously is impossible for us to endeavor to work out at this time in dollars your obligation to us, nor in fact do we think it necessary. I may say, however, that we are not interested in allocation of your stock at this time as security to us under these circumstances. What we wanted you to realize was that you have had in us devoted and constant attorneys and that we have finally reached a point where we necessarily seek to protect ourselves from what we regard as an unnecessary and uncalled for attack.

Petitioner insisted on getting the record (Ex. 13, R. 258-259), but was shortly thereafter injured in an accident (Ex. 64, R. 305); at this juncture, away from home, he surrendered (Ex. 15, R. 260): "Better now you keep record and use it effectively." Respondents retained the record and filed exceptions and brief (R. 44).

Petitioner admitted that from that time until February 1938, respondents continued active in the Federal Case with his knowledge and consent (R. 99-100), "but only because they stayed in after I tried to kick them out in August, 1937. * * * They refused to give [the record], and refused to render a bill and stayed on, needlessly, on my payroll from there on without my will."

In February 1938, another dispute arose, based on petitioner's dissatisfaction over the handling of the Federal Case (R. 105-107; Ex. 16, R. 260; Ex. 18, R. 262), and peti-

tioner had occasion, once again, to dismiss respondents; he wired (Ex. D(1), R. 317), "Hereby advise I forbid oral appearance by you or Friedman my behalf Cleveland Monday and again ask you all voluntarily withdraw from federal case." Respondents once more refused to withdraw; Lurie wrote (Ex. D, R. 316-317):

> * * * I ask you to consider again the fact that you have had our complete loyalty throughout in this long drawn-out and fatiguing controversy with Cold Metal, and that you give thought also to the fact that we now have a vital interest in this entire litigation which we will protect to the utmost, and which we will not permit you through unjustified accusations to jeopardize in the slightest.

Lurie came to Youngstown, and, after a conference, petitioner relented (Ex. 17, R. 261).[3]

Thereafter, until about the end of 1940, respondents rendered legal services to petitioner in connection with the Federal Case (R. 15, 48-49, 53-57), although in 1939 petitioner had retained Bulkley and Butler as his primary counsel therein (R. 15, 53-57, 114-115, 212). Petitioner testified, referring to respondents' later services (R. 115),

> If it is true that he [Lurie] did come it was to bring the record which they were refusing to give up and I was helpless, and our lawyer was without it. That is what they kept themselves in what they call "employment" after I fired them for refusing to give up that very essential record. If you call that employment, all right.

The fact of the matter was that respondents had the record, Bulkley & Butler did not have it (R. 115-116)—and

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[3] In the cited letter, petitioner indicated (par. 4) that he never desired either respondents or Friedman to withdraw from the Option or Advances cases. Even in 1937, at the time of petitioner's first attempt to dismiss respondents from the Federal Case, he had wired (Ex. 11, R. 256), "Please soon propose terms for continuing other cases."

respondents still had the record at the time of the trial herein (R. 231, 242).

(ii) *Respondents' failure to submit a bill.* Although respondents asserted their retaining lien on the record to the end, they admit that they never submitted any bill for services (R. 139, 162), and in connection with their refusal to accept a partial payment on account in 1940-41, it is not disputed that they never told petitioner's counsel what their bill was (R. 214).

In 1937, when petitioner first attempted to dismiss them, they refused specifically to comply with his request that they indicate what was then owing (Exs. 11-12, R. 256-257).

Petitioner testified that, at a meeting in December 1940, respondents demanded 120 shares of Cold Metal stock plus $45,000 in cash (R. 238, 120). Respondents did not specifically deny making such a demand, though they did testify that they never attempted to get any of petitioner's stock during the period of their active employment (R. 129-130, 165). Thereafter, in the course of the correspondence which followed petitioner's offer of a partial payment, respondents indicated a willingness to submit a bill in dollars (Ex. 25 at R. 276; Ex. 26, R. 277; Ex. 27, R. 277-278). Later, however, they refused point-blank either to accept the tender of partial payment already made or to submit a bill in dollars, in the absence of a conference and a final agreement as to their ultimate compensation (Ex. 36, R. 285; Ex. 37 at R. 286; Ex. 38, R. 287). In fact, respondents never formulated their claim in terms of money until the complaint was filed herein (R. 4), five and a half years after the date of their last letter in this record (Ex. 40, R. 288).

(iii) *Respondents' refusal to accept an unconditional partial payment in circumstances prejudicial to petitioner.* After his December 1940 meeting with respondents (R. 238, 120), petitioner offered respondents $5000 in cash and 15 shares of Cold Metal stock, which he then valued at $4000 a share, in complete settlement (Ex. 23, R. 273; R. 120-121). He then caused 15 shares to be put in their names under

the escrow agreement under which his stock was held, so that they would receive certificates of beneficial interest plus all dividends accruing on the stock (R. 122). Early in January 1941, respondents received a check for $12,375, representing a dividend declared on those 15 shares (Ex. 25 at R. 275; Ex. 61 at R. 301).

Respondents were not satisfied with this arrangement (Ex. 41, R. 289; Ex. 61, R. 301-302), whereupon petitioner eliminated the "complete settlement" feature (Ex. 24 at R. 274). Considerable correspondence ensued (Exs. 25-30, R. 275-279), at the end of which petitioner's counsel wired that acceptance of the 15 shares and the $12,375 check on account would be without prejudice either to the making of a further demand, or to a valuation of the stock on a basis different from that made by petitioner (Ex. 31, R. 280).

None the less, respondents returned the check (Exs. 32-33, R. 281), and disclaimed any right to the stock (Ex. 40, R. 288-289). This had the effect of depriving appellant of a tax deduction, and required him to pay additional income taxes for 1940 in the amount of $42,519.94 (R. 122, 214-215, 221). Petitioner had earlier advised respondents that a rejection on their part would have this effect (Ex. 35 at R. 284), and in fact the additional tax made 1940 his heaviest tax year in a five year period (Ex. F, R. 319).

Lurie testified that his refusal and Alper's to accept the shares-plus-dividend-check was based, first, on the circumstance that their employment would not have permitted them to take advantage of the carry-back provisions of Sec. 107 of the Internal Revenue Code (R. 130, 226-227), and second, that acceptance would have required them to raise additional cash to pay the taxes due on the income represented by the stock (R. 131).

Respondents' contemporaneous letters, the burden of which was that no partial payment would be accepted in the absence of a final understanding as to the ultimate amount of respondents' compensation (Ex. 61, R. 301-302;

Ex. 25, R. 275-276; Exs. 27-28, R. 277-278; Ex. 33, R. 281; Exs. 36-38, R. 285-287), do not reflect the reasons which the respondent Lurie assigned on the stand as the grounds of respondents' refusal. And none of respondents' contemporaneous letters assert any objection whatever to the medium of petitioner's tender of partial payment.

D. Proceedings Subsequent to Trial and on Appeal.

The district judge filed an opinion in which he concluded that (R. 321)—

> In view of all the circumstances, the expenses advanced, the services rendered and accepted, it would be unconscionable and unjust to allow the plaintiffs nothing. On the other hand, in view of the circumstances, the relation of the parties, the correspondence, and professional considerations, it would be wrong to allow the plaintiffs the amount they ask.

He accordingly held (R. 324) "that a fair per diem allowance for an average of all the days would be $100," and in consequence caused judgment to be entered for $153,925 for services, and $7225.80—later corrected to $8738.07 (R. 327)—for expenses (R. 324, 327).[4]

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[4] On the same day that the judgment was thus modified, the district judge amended his opinion (R. 325-326) by omitting therefrom the following paragraph (R. 327):

> It may certainly be said that plaintiffs' adherence to the defendant's cause was more than professional ethics would demand—it may probably be said that it was more than exact professional standards should condone. But for the inability of the defendant to pay the plaintiffs, their continuation in his service could hardly be justified, they themselves would probably not attempt to justify it. The case exemplifies the truth which centuries of professional experience teaches, i. e., that the relationship of attorney and client and all professional relationships are based on mutual trust and cannot be forced. When that trust ceases, the relationship should end.

This amendment was effected informally (R. 325-326) and was not entered on the docket (R. 385-386).

The district judge's findings and conclusions covered only the following: Findings as to the fact and scope of employment, the agreement for compensation, and the time devoted to services for petitioner (Fdg. 1-3, R. 328); a finding as to the expenses advanced by respondents (Fdg. 4, R. 329); a finding that petitioner's Cold Metal stock was without market value at the time of respondents' employment and that it was of the value of at least $4000 per share at the termination of the employment (Fdg. 5, R. 329);[5] and conclusions of law as to the fair and reasonable value of respondents' services and as to the amount in which recovery should be had (R. 329).

There were no findings as to petitioner's attempts to dismiss respondents, nor as to their failure ever to present a bill, nor as to the circumstances and consequences of their refusal of an unconditional partial payment. And although the district judge stated in his opinion that he was fixing respondents' compensation in the light of eight enumerated factors,[6] he made no findings as to any of those factors other than the time spent.

Petitioner timely moved for a new trial and for oral argument thereon (R. 330). About a month thereafter, the district judge wrote and initialed a memorandum, copies of which were sent to counsel by the clerk, as follows (R. 332):

> This motion for a new trial should be held until disposition of the money impounded in the Clerk's office

[5] Significantly, there was no finding that, as had been stipulated (*supra*, p. 5), the value of Cold Metal stock was primarily dependent on the outcome of the company's patent litigation, and the respondents had no connection whatever with such matters.

[6] R. 323: "It therefore becomes the duty of this court to fix according to accepted standards the amount which the defendant should pay to the plaintiffs in view of [1] all the facts and circumstances revealed by the stipulation, [2] the evidence, and [3] the correspondence, taking into account [4] the age and experience of the plaintiffs, [5] the time spent, [6] the services rendered, [7] the amount paid to other counsel for similar services, and [8] the results." [Bracketed numbers added.]

> is determined. If that money does not go to Cold Metal, a new trial or modification of the judgment allowed in this case should be made.

Sixteen months after the motion, and almost fifteen months after this memorandum, without affording the parties an opportunity to show the disposition of the impounded funds or to prove whether or not the money in fact went to Cold Metal,[7] the district judge overruled both the motion for a new trial and the request for oral argument thereon.

On appeal (R. 335), petitioner designated, *inter alia*, the district judge's memorandum quoted above (R. 338, item 18), and respondents designated (R. 341-342) eight orders in the three other cases in which the Cold Metal funds had been impounded. Petitioner moved to strike the latter orders on the ground that they had not been introduced into evidence in the case in chief (R. 382). Respondents countered with a motion to strike the judge's memorandum (R. 383), and conceded that, if that memorandum were stricken, the other orders should likewise be stricken (R. 384). Notwithstanding this concession, the court of appeals granted respondents' motion to strike the memorandum but denied petitioner's motion to strike the extraneous orders (R. 407).

On the merits, the court below affirmed (R. 389-407).[8]

REASONS FOR GRANTING THE WRIT.

The importance of the present case for purposes of review by this Court lies in the disregard of the Rules of Civil Procedure which the record herein reflects. By affirming the district court's conclusion of law as to the fair

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[7] In fact, out of nearly $15,000,000 impounded by the United States and released (R. 342), about $8,450,000 was immediately thereafter seized by the United States under a jeopardy tax assessment.

[8] The point as to the district judge's competency to sit after retirement, extensively discussed in the opinion (R. 389-394), is not now in issue.

and reasonable value of legal services, reached without any findings of subsidiary facts on which that ultimate conclusion can rationally be predicated, the court below did precisely what this Court in *Kelley* v. *Everglades District,* 319 U. S. 415, held may not be done. A similar irregularity is involved in the attempt of the court below to resolve the alleged impropriety of respondents' professional conduct, strongly relied on by petitioner in defending their present action to recover a fee, in the absence of any findings whatever by the district court as to the incidents giving rise to petitioner's defense, even though the district court reduced respondents' recovery because of "professional considerations". Further irregularities are found in the action of the court below, at variance with rulings in other circuits, in striking and refusing to strike particular items from the record on appeal, and in the district court's *ex parte* reference to extraneous documents without permitting petitioner to overcome their effect.

Petitioner seeks review here, not to enforce the symmetry of the *elegantia juris* in a vacuum, but because, as will briefly be demonstrated, the failure of the tribunals below to adhere to the Rules promulgated by this Court has resulted in injustice, viz., petitioner's inability to defend against an excessive and essentially improper claim for legal services.

1. The district court undertook to fix the value of respondents' services in the light of eight enumerated factors (R. 323, quoted in note 6, *supra,* p. 14)—but made a finding of fact as to only one of those eight, viz., the time spent (Fdg. 3, R. 328)—which had been stipulated (R. 20). The district court determined the "fair and reasonable value" of respondents' services as a conclusion of law (Conc. 2, R. 329), a conclusion which it faintly supported by so much of its opinion as indicates that a flat per diem of $100 a day was applied to reach that valuation (R. 324). But there is nothing in the findings, and nothing in the generalized homilies of the opinion, which will enable any one to ascertain just what it was that respondents did in any particular

litigation or in any other activities, or what tangible results their own efforts obtained, that were worth $153,925.00 (R. 327). Consequently, there are no findings "sufficient to indicate the factual basis for the ultimate conclusion", as required by *Kelley* v. *Everglades District,* 319 U. S. 415, 422 (fairness *vel non* of plan for composition of drainage district's debts); and there are no findings "of subsidiary facts on which the ultimate conclusion of [fair and reasonable value] can rationally be predicated." *Ibid.* at 420. There is only a quotient judgment for almost precisely one-half of the *ad damnum* in the complaint (R. 4).

The court below, after saying that the findings of fact were not "clearly erroneous" within Rule 52(a), went on to say (R. 407), "The judgment was amply supported by the findings of fact and by the evidence."

Petitioner submits that, at the very least, the district court was bound to make specific findings as to the facts which it considered in arriving at its conclusion as to "the fair and reasonable value" of respondents' services and that, as in *Kelley* v. *Everglades District,* 319 U. S. 415, 420. "there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated."

Here there are no such findings. So far as the evidence is concerned, what this Court said further in the *Kelley* case is applicable here in full measure. There, after listing a number of "appropriate facts which might have been considered", the Court said (319 U. S. 421-422):

> It may be that adequate evidence as to these matters is in the present record. On that we do not pass, for it is not the function of this Court to search the record and analyze the evidence in order to supply findings which the trial court failed to make. Nor do we intimate that findings must be made on all of the enumerated matters or need be made on no others; the nature of the evidentiary findings sufficient and appropriate to support the court's decision as to fairness or unfairness is for the trial court to determine in the first

> instance in the light of the circumstances of the particular case. *We hold only that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion.* [Italics added.]

Petitioner's contention that it was similarly error not to make findings here is based, not on considerations of craftsmanship or mere artistry, but on the circumstance that findings on the critical points in controversy would have permitted his making the substantive argument that (a) the actual results attained by respondents were excessively meager and outstanding for lack of success, and (b) that the item primarily looked to by both courts below, viz., the appreciation in value of petitioner's Cold Metal stock (R. 322; Fdg. 5, R. 329; R. 399, 402), was a consequence of the ultimate validation of the Cold Metal patents (R. 9), with which respondents admittedly had nothing to do (R. 22).

Significantly, the district court did not find, what was the fact, that (1) respondents lost two of petitioner's three lawsuits and were partially successful in the third only after other lawyers had succeeded to the main responsibility (*supra*, pp. 5-7), that (2) far from helping petitioner keep his Cold Metal stock, their lack of success in the *Option Case* resulted in his losing 160 of his shares (*supra*, p. 6), or that (3) the accretion in the value of his stock, which alone made him a wealthy man, was not in any degree a consequence of their representation (*supra*, p. 5). Yet respondents were awarded large fees essentially because ultimate victory in the collateral patent litigation resulted in petitioner's ability to pay such fees.

Petitioner is not asking that this Court should review this case because of the minutiae of the dispute and the resultant injustice; he urges that review is warranted because of the disregard of the Rules of Civil Procedure which brought about that injustice.

2. The district court stated in its opinion (R. 321) that "in view of the circumstances, the relation of the parties,

the correspondence, and professional considerations, it would be wrong to allow the plaintiffs the amount they ask." What those "professional considerations" were can be ascertained neither from the opinion nor from the findings. Yet petitioner's principal substantive defense is based upon professional considerations.

That defense will be summarized here, not on the view that its validity or otherwise warrants review by this Court, but simply to demonstrate its substantiality and to underscore the irregularity of disposing of it without findings as to the material facts out of which it arose.

Briefly, petitioner's defense starts with the premise, that under the law of Ohio, which governed here,[9] he had an absolute right to dismiss his lawyers at any time. *Dodson* v. *Riddle*, 1 Dec. Rep. 54, 1 W. L. J. 393 (Ohio 1844); *Keyes* v. *Follett*, 41 Ohio St. 535, 539; *accord*, for the general law, *In re Paschal*, 10 Wall. 483, 496-497. That being so, respondents had no right to resist dismissal.[10]

Respondents' justification for doing so was petitioner's alleged inability to pay them their charges to date (R. 255) and their assertion that they had "a vital interest in this entire litigation which [they would] protect to the utmost * * *" (R. 317). Of course the law would not permit

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[9] Because the contract of employment was made in Ohio. *Roe* v. *Sears, Roebuck & Co.*, 132 F. 2d 829, 831 (C. C. A. 7); *Spellman* v. *Bankers' Trust Co.*, 6 F. 2d 799, 800 (C. C. A. 2).

[10] The opinion below seems to suggest (R. 403-404) that petitioner was unreasonable in attempting to dismiss respondents in 1937 for asking an extension of time for filing exceptions to the master's report. This overlooks the rule, see cases cited immediately above in the text, that the right of a client to discharge his attorney is an absolute right. If the discharge was for good cause, the attorney loses all right to compensation. *Woodbury* v. *Andrew Jergens Co.*, 61 F. 2d 736 (C. A. 2), certiorari denied *sub nom. Berenson* v. *Woodbury*, 289 U. S. 740. If the dismissal was without good cause, the attorney is entitled to compensation on *quantum meruit* for the work already done. *Marquam* v. *Vachon*, 7 F. 2d 607 (C. C. A. 9). But whether the dismissal was for good cause or not is immaterial on the right to dismiss; an attorney who resists dismissal is always wrong.

respondents to maintain their client's cause of action in their own interest, *Spellman* v. *Bankers' Trust Co.*, 6 F. 2d 799, 800 (C. C. A. 2), and since in the litigation covered by the parties' agreement (R. 9, 11) petitioner was a defendant and not a plaintiff, respondents could acquire no lien on the subject-matter of the lawsuits. *Wessinger* v. *Sturkie*, 77 F. 2d 751, 753 (C. C. A. 4); *Chancey* v. *Bauer*, 97 F. 2d 293, 294 (C. C. A. 5).

At most, therefore, respondents had a retaining lien on such of petitioner's property as had come into their hands by virtue of their employment. *Newcomb* v. *Krueger*, 36 Ohio App. 469, 471. Petitioner was entitled to a release of the papers held under that lien upon securing the payment of accrued charges (*In re San Juan Gold, Inc.*, 96 F. 2d 60 (C. C. A. 2); *Everett, Clarke & Benedict* v. *Alpha Portland C. Co.*, 225 Fed. 931, 938 (C. C. A. 2)), and in fact when petitioner asked for the return of the transcript, he asked respondents to state his present obligation and the amount of security they required (R. 256). But respondents refused to ship the transcript, professed inability to compute petitioner's obligation, and refused even to consider taking security therefor (*supra*, pp. 8-9). Petitioner's contention is that nothing in Ohio law—or elsewhere[11]—justifies the continued assertion of an attorney's retaining lien in such circumstances.

Consequently petitioner's position is that respondents' remaining in the case thereafter was improper and unprofessional; that their further services were accordingly officious; that petitioner's consent to their further employ-

[11] Respondents' asserted lien could not be justified by the law of their own state. While Mass. Gen. Laws (Ter. Ed.), c. 255, § 32 recognizes "liens claimed * * * by attorneys at law, upon books, papers, documents or other personal property * * *," Sec. 31 provides that " * * * The person claiming a lien upon said personal property shall, upon demand therefor, furnish the person owning or having an interest in said property with a statement of the amount and reasons, or other considerations, for which the lien is claimed."

ment, in view of their retention of the record, was involuntary because induced by commercial duress (*Lonergan* v. *Buford*, 148 U. S. 581; *Union Pac. R. R. Co.* v. *Public Service Comm.*, 248 U. S. 67), and that their improper conduct, thus uncondoned, would not support a recovery for any services rendered after the attempted dismissal.

The court below said (R. 405), "At no time did Steckel ever attempt to discharge or dismiss appellees as his attorneys." How this statement can be squared with Steckel's 1937 telegram (R. 253), "dismissal from case on first notification deliberate and unconditional," or with his 1938 wire (R. 317), "Hereby advise I forbid oral appearance by you or Friedman my behalf Cleveland Monday and again ask you all voluntarily withdraw from federal case," is indeed difficult to understand.

Petitioner is not urging this Court to review the case because the evidence establishes error in the quoted statement from the opinion below. Petitioner urges only that review is warranted because of the departure from accepted procedural standards involved in the approval by the court below of the district judge's failure to make any findings of fact whatever as to this essential—and substantial—issue.

3. The case presents other substantial—and disquieting—questions of professional conduct.

Admittedly, see p. 11, *supra*, respondents never, at any time, sent petitioner a bill for their services, nor is it disputed that they never reduced the amount of their claim to dollars until they filed the complaint herein (R. 4). The treatment of this point *sub silentio* by the court below is surely an extraordinary condonation of a grave breach of professional faith.

Additionally, respondents refused an unconditional tender of stock and cash, made without prejudice to their assertion of a larger claim, in circumstances highly detri-